

1989

Patricia G. Smith (Taylor) v. Scott G. Smith : Brief of Respondent

Utah Court of Appeals

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BRIEF

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IN THE COURT OF APPEALS
OF THE STATE OF UTAH

PATRICIA G. SMITH (TAYLOR), :

Plaintiff/Respondent, :

vs. :

SCOTT G. SMITH, :

Defendant/Appellant. :

890246-CA
Case No. ~~890025-CA~~
Category 7

BRIEF OF RESPONDENT

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COURT OF APPEALS

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vs. :
SCOTT G. SMITH, : Case No. 890025 CA
Defendant/Appellant. : Category 7

BRIEF OF RESPONDENT

JURISDICTION

The Court of Appeals has appellate jurisdiction over this domestic relations child custody matter pursuant to Utah Code Ann. sec. 78-2a-3 (2) (h) (Supp. 1989).

DETERMINATIVE STATUTES

Utah Code Annotated, Sec. 30-3-5, 1953 as amended.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Defendant/Appellant (Scott Smith) seeks to modify the Decree of Divorce by first attempting to show a substantial change of circumstances for purposes of changing child custody; and that it is in the best interest and welfare of the child to modify the

Decree of Divorce.

B. DISPOSITION IN LOWER COURT

The Honorable Ray M. Harding, in an Order of the Fourth Judicial District Court, ruled that Scott Smith's Petition to Modify the Decree of Divorce was to be dismissed in that there was not a showing of substantial and material change of circumstances to warrant a change of custody.

Prior to the trial, a Motion in Limine was granted to restrict evidence prior to December 14, 1984, pertaining to matters which were previously litigated before the Court in an Order to Show Cause hearing in re contempt.

C. COURSE OF THE PROCEEDINGS AND RELEVANT FACTS

On April 13, 1981, the Honorable J. Robert Bullock, of the Fourth Judicial District Court of Utah County, entered a Decree of Divorce to the captioned parties thereby granting custody of the parties minor child, Jesse, to Patricia Taylor. (R. 15-16). The Defendant Scott Smith was not present at the hearing as he had executed a Consent and Waiver for Entry of Judgment which had been duly filed with the Court. Scott Smith executed this Consent and Waiver through an attorney and acknowledged that he had been given the opportunity to consult with an attorney prior to its execution. (R. 5-6).

In the Consent and Waiver, Scott Smith consents that his

default may be entered consistent with the provisions contained in the Amended Complaint which states that the Plaintiff (Patricia Taylor) is a fit and proper parent and should be awarded the sole care and custody of the minor child of the parties. (R. 1-3).

On August 21, 1981, the Honorable Maurice Harding of the Fourth Judicial District Court entered an Order Modifying the Decree (R. 27-28) which specifically defined Scott's visitation. This Order was a result of the Court's holding a hearing on Scott's Motion for Order to Show Cause filed July 20, 1981. (R. 19). The purpose of this Order to Show Cause was to further establish visitation rights.

A subsequent Order to Show Cause hearing was heard on August 6, 1982, before the Honorable J. Robert Bullock, resulting in an Order dated the 17th day of August, 1982, wherein the Defendant was ordered to pay to the Clerk of the Court the sum of ONE HUNDRED TWENTY-FIVE DOLLARS (\$125.00) per month for the support and maintenance of the minor child of the parties. Such money was to be held until the Court directed its further disposition. (R. 79-80).

On August 15, 1984, an Order to Show Cause was issued on the Defendant Scott Smith's behalf (R. 91) for the purposes of finding the Plaintiff in contempt of court, and to modify the Decree of Divorce to specify visitation rights including locations

and times where the child could be picked up by appropriate parties for the Defendant's visitation. Complications regarding visitation had resulted due to the Plaintiff and the minor child moving to Mexico and then to Arizona. (R.89-90).

The hearing on October 3, 1984, was continued to a later date due to the Plaintiff acquiring new counsel and due to her medical situation at that time. (R. 98-100).

The hearing on Defendant's Order to Show Cause was held December 11, 1984, where both parties were present. On December 14, 1984, Judge Bullock entered an Order Modifying Decree which set forth the Defendant's visitation rights in greater detail. The Court further found the Plaintiff to be in contempt of court for violating both the spirit and language of the Order regarding visitation. The Court further found that the Plaintiff may purge herself of said contempt by engaging in a course of conduct which will affirmatively effectuate the Defendant's visitation schedule. (R. 158-166).

In the Order Modifying Decree, dated December 14, 1984, the Court modified paragraph 5 of the original Decree of Divorce providing that the Defendant Scott G. Smith be awarded certain custodial and visitation rights. (R.163-164). This was not for the purpose of diluting the Plaintiff Patricia Taylor's custody nor "to give joint custody as joint custody is generally

understood." (Tr. 577). The apparent purpose of awarding such custodial rights to the Defendant was to assist him in effectuating his visitation schedule from the Mexican authorities. (R. 130-133).

During the process of these Order to Show Cause hearings resulting in different Orders Modifying the Decree, the Defendant never petitioned the Court to award a change of custody of Jesse, nor tried to show a material change of circumstances which would justify a change of custody.

On June 2, 1988, Patricia Taylor filed in Texas an original suit affecting the parent/child relationship as it relates to visitation and a temporary restraining order relating to the terms and conditions of this visitation. The temporary restraining order was filed on June 6, 1988, and a hearing was scheduled in Texas for June 21, 1988. (R. 283-290).

On June 20, 1988, a conference call was held between Lupi Eggemeyer, Court Master for County Court at Law #5, El Paso, Texas, and Judge Ray Harding of the Utah County Court in Provo, Utah. It was mutually agreed upon that Scott Smith and Patricia Taylor were to be permanently restrained from engaging in any psychological manipulation or brain washing of Jesse. The visitation schedule was ordered to continue as set forth in the Utah Order. (R. 304-305).

On June 21, 1988, the Defendant filed a Petition to Modify Decree of Divorce for the purpose of awarding a change of custody of Jesse from the Plaintiff to the Defendant. The Petition states that the actions of contemptuous behavior of the Plaintiff constitutes a material change of circumstances which would justify awarding a change of custody. (R. 294-298).

On July 27, 1988, Patricia Taylor through Utah counsel filed a Motion to Stay Proceedings stating that custody should be determined in Texas pursuant to Title 78, Chapter 45(c), Utah Code Annotated, 1953 as amended. (R. 306-313).

On September 15, 1988, Judge Harding entered a Memorandum Decision denying the Motion to Stay Proceedings, finding that jurisdiction over the custody of Jesse Smith continued to rest in the State of Utah. (R. 359).

On December 9, 1988, Patricia Taylor filed a Motion for Summary Judgment with regard to Defendant's Petition to Modify the Decree of Divorce to change the custody of Jesse. In an informal conference prior to trial, the Court denied such a Motion for Summary Judgment on the grounds that there were material issues of fact which remained to be determined. (R. 405).

On December 12, 1988, the Plaintiff made a Motion in Limine to prohibit the introduction of evidence prior to December 14, 1984, since such evidence had previously been litigated before

the Court on December 11, 1984, which resulted in Plaintiff being held in contempt of court. (R. 419-420). Judge Harding granted such Motion in Limine on December 13, 1988. (R. 405-406).

Trial was held on December 13, 1988, after which Judge Harding granted Plaintiff's Motion to Dismiss in that there was not a material change of circumstances proven in order for the Court to shift custody to the Defendant. (R. 425-427).

SUMMARY OF ARGUMENT

When there has been an adjudication, it becomes Res Judicata as to those issues which were either tried and determined, or upon all issues which the party had a fair opportunity to present and have determined in other proceedings.

On January 27, 1981, Defendant Scott Smith, being represented by an attorney entered into a Stipulation for divorce consenting that custody be awarded to Plaintiff who was "a fit and proper parent". A Decree of Divorce was subsequently entered on April 13, 1981. On August 21, 1981, some four (4) months after the entry of the Decree of Divorce, an Order to Show Cause hearing was held upon which the Court modified the Decree specifying Defendant's visitation. Defendant was again in Court on August 6, 1982, for an Order to Show Cause hearing, being represented by counsel, of which further evidence was produced. Two (2) years later, December 11, 1984, and after an extensive hearing, the

Court again modified the Decree of Divorce further specifying Defendant's visitation rights; and after hearing all of the evidence the Court held Plaintiff in contempt of Court and entered an Order dated December 14, 1989, in which Plaintiff was entitled to purge herself by future conduct.

In 1988 when Defendant petitioned the Court to again modify the Decree of Divorce, the Court properly granted Plaintiff's Motion in Limine preventing the presentation of the same evidence that had previously been litigated in the 1981, 1982, and 1984 hearings for the purpose of showing a substantial change of circumstances. Defendant had the opportunity of asking the Court to change custody in 1984 and have the evidence that was presented considered as to whether it constituted a substantial change of circumstances. Having had that opportunity, he chose only to have it presented for the purpose of a contempt citation.

To permit the Defendant to present the same evidence that was presented in 1981, 1982, and 1984 for the purpose of permitting Defendant to carry his burden of showing a substantial change of circumstances flies in the face of the doctrine of res judicata. Those facts have been judicially acted upon once, and the Court properly precluded those same facts to be relitigated on a different claim.

ARGUMENT

POINT I

FACTS PRIOR TO DECEMBER 14, 1984, PROPERLY EXCLUDED ON THE BASIS OF BEING RES JUDICATA

Since the Decree of Divorce, the parties have been unable to agree with regard to the visitation of the child, Jesse. This has required two hearings and in December of 1984, a lengthy evidentiary hearing took place in which the Defendant presented substantial evidence with regard to the displeasures he experienced in visiting his child. His evidence was convincing enough that the Plaintiff was held in contempt of Court and given the opportunity to purge herself by conduct in the future. The relief Defendant sought in December of 1984 was contempt, and specificity with regard to future visitation rights. For whatever reason he did not choose to seek a change of custody.

The doctrine of res judicata has a dual purpose in (1) barring the prosecution of a second action upon the same claim, demand, or cause of action, and (2) to preclude the relitigation of particular facts or issues in another action between the same parties on a different claim or cause of action. 46 AmJur2nd sec. 394.

Res judicata has the two branches of claim preclusion and issue preclusion. Claim preclusion prohibits the relitigation

of claims which have previously been litigated between the same parties, and also prevents claims which "could and should have been litigated in the prior action, but were not raised." Masters v. Worsley, 777 P2d 121, 503 (Utah App. 1989); Copper State Thrift and Loan v. Bruno, 735 P2d 387, 389 (Utah App. 1987). Issue preclusion (collateral estoppel) applies when the issues have been "competently, fully and fairly litigated" in the "context of a different cause of action." Id.

The Utah Court of Appeals recently outlined the doctrine of res judicata in divorce actions. In Throckmorton v. Throckmorton, 767 P2d 121 (Utah App. 1988) the Court stated:

"When there has been an adjudication, it becomes res judicata as to those issues which were either tried and determined, or upon all issues which the party had a fair opportunity to present and have determined in the other proceedings."

Because the Defendant has fully litigated Plaintiff's behavior prior to December of 1984, the Court properly ruled that its relitigation should be barred by the doctrine of res judicata. The Defendant Scott Smith, at the time of the contempt hearing had ample opportunity to show that there was a substantial change of circumstances and ask for a change of custody and a modification of the original Decree of Divorce but he chose not to do so.

The Defendant Scott Smith wants the opportunity of relitigating all of his previous evidence that was heard in the

contempt proceeding. He now urges upon the Court that since he initially entered a consent and waiver, that the Court has really never heard evidence with regard to the best interest and welfare of the child. This point is not well taken since it is eight (8) years from the time that the divorce was heard and four (4) years since the evidence he wants to relitigate was presented.

The Defendant relies on Elmer v. Elmer, 776 P2d 599 (Utah 1989) which states that the res judicata aspect of the strict "changed circumstances" rule of the Hogge two-pronged test must be "subservient to the best interest of the child." Id. at 603. See Hogge v. Hogge, (Infra.) 649 P2d 51 (Utah 1982). In Elmer, the Court pointed out that where custody determinations are not adjudicated (i.e., a custody award made in a default divorce case by stipulation), "the res judicata policy underlying the changed-circumstances rule is at a particularly low ebb." Elmer, at 603. In that case however, there were no subsequent hearings (as in the present case) of which the parent seeking to change custody had ample opportunity to show a material change of circumstances for the purpose of changing custody.

The Plaintiff, Patricia Taylor, does not necessarily claim res judicata to the facts stipulated to in the default divorce decree, but to the facts litigated in subsequent hearings prior to December 14, 1984. Therefore, the strict "changed

circumstances" rule of the Hogge two-pronged test is still applicable.

Sec. 30-3-5, Utah Code Annotated, 1953 as amended, provides that the Court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of property as is reasonable and necessary.

Pursuant to this language, the Court may modify the Divorce Decree "as shall be reasonable and necessary". Because of a variety of circumstances in domestic disputes, "no firm rule can be uniformly applied in all divorce cases and each must be determined upon the basis of the immediate fact situation". Hunsaker v. Fake, 563 P2d 784 (Utah 1977); Wilson v. Wilson, 5 Utah2d 79, 82; 296 P2d 977, 979 (1956).

Allowing the past contempt proceedings to be reentered which has already been adjudicated would not enable the Court to determine a substantial change of circumstances "on the basis of the immediate fact situation". The Court specifically found that Plaintiff's conduct has improved since she was found to be in contempt of Court although such improvements were not deemed sufficient to constitute purging herself of that conduct. Thus, the contempt proceeding is moot, it is res judicata, and it was

totally proper not to allow the same evidence to be entered again on the question of whether or not a substantial change in circumstances had occurred.

A two prong test has been established for considering the request to change custody awards. This test is enunciated basically in two cases, Hogge v. Hogge, 649 P2d 51 (Utah 1982) and Becker v. Becker, 694 P2d 608 (Utah 1984). The test was recently outlined in Kramer v. Kramer, 738 P2d 624 (Utah 1987). In Kramer the Court stated:

"Under the first prong, the parties seeking modification must show that there has been a change in the circumstances upon which the original custody award was based which substantially and materially effects the custodial parents parenting ability or the functioning of the custodial relationship which justifies reopening the custody question. Once a substantial change of circumstances has been established, the petitioner must show under the second prong that the requested change in custody is in the best interest of the child."

The purpose of the two part Hogge test is founded upon the premise that stable custody arrangements are of critical importance to the child's proper development. In the Kramer case (supra. at 626) the court stated:

"For this reason, when the trial court is asked to determine whether there has been a change of circumstances sufficient to warrant the reopening of the custody Decree, ordinarily it must focus exclusively on the parenting ability of the custodial parent and the functioning of the established custodial relationship."

In Becker (supra. at 610) the Court held that the standard requires that:

"the asserted change in circumstances have some material relationship to and substantial effect upon parenting ability for the functioning of the presently existing custodial relationship."

The Court was therefore not only proper in ruling that the pre-December 14, 1984, evidence was barred by the doctrine of res judicata, the trial court should also be affirmed on the basis that pre-December 14, 1984, evidence could have no relationship to immediate fact situation, nor could it be material as to the presently existing custodial relationship.

CONCLUSION

THE TRIAL COURT PROPERLY RULED THAT EVIDENCE PRESENTED IN A PRIOR CONTEMPT HEARING SHOULD NOT BE ALLOWED TO BE RELITIGATED AT A SUBSEQUENT HEARING FOR THE PURPOSE OF SHOWING A SUBSTANTIAL CHANGE OF CIRCUMSTANCES.

Appellant's points are not well taken because the evidence presented at the December 14, 1984, hearing should not be relitigated for the purposes of showing a substantial change of circumstances in 1988. Such evidence was properly precluded for the following reasons:

1. Res judicata;
2. A determination of substantial change of circumstances should be based on an immediate fact situation; and
3. Pre-December 14, 1984, conduct would be contrary

to showing a substantial change of circumstances on parenting ability or functioning of the presently existing custodial relationship.

DATED this ____ day of November, 1989.

ROBERT L. MOODY
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the ____ day of November, 1989,
I mailed a true and correct copy of the foregoing to Wayne B.
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